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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHARLES R. BUCKMAN, DENNIS J. COX, DONOVAN M. KOLBY, CRAIG S. CANTRELL, BRIAN C. SMITH, JON H. WERNER, MARC WILLEBEEK-LEMAIR, J. WAYNE BLACKARD, and FRANCIS S. WEBSTER III

Appeal 2009-003646
Application 09/928,771
Technology Center 2400

Decided: December 17, 2009

Before HOWARD B. BLANKENSHIP, ST. JOHN COURTENAY III, and DEBRA K.STEPHENS *Administrative Patent Judges*.

COURTENAY, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 34, 47, and 60-69. Claims 1-33, 35-46, and 48-59 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

STATEMENT OF THE CASE

THE INVENTION

Appellants' invention relates generally to computer networks. More particularly, Appellants' invention relates to programming network nodes to provide services in a best effort, packet-based network architecture. (Spec. 1, ll. 2-5).

Claim 34 is illustrative:

34. A system for programming a packet-based network having a plurality of nodes for providing services to network subscribers, the system comprising:

a service creation tool operable to program a service definition package, said service definition package defining a plurality of packet processing behaviors;

a service control center interfaced with the packet-based network and operable to accept said service definition package for deployment to at least one network node, said service control center comprising:

a first logic element operable to select one or more network processors for implementing said service definition package;

a second logic element operable to provide network processor-specific instructions and data to perform packet processing behaviors;

a third logic element operable to load said instructions and data into said one or more network processors;

a fourth logic element operable to monitor information from one or more network processors; and

a fifth logic element operable to utilize said information from said one or more network processors to report status information about said service definition package; and

at least one network node interfaced with the network, the node having a network processor, the node operable to perform the one or more packet processing behaviors.

PRIOR ART

The Examiner relies upon the following references as evidence:

Patterson	US 2002/0052941 A1	May 2, 2002
Tindal	US 2002/0069274 A1	June 6, 2002

THE REJECTION

The Examiner rejected claims 34, 47, and 60-69 under 35 U.S.C. § 103(a) as unpatentable over the combination of Tindal and Patterson.

CLAIM GROUPING

Based on Appellants' arguments in the Appeal Brief, we will decide the appeal on the basis of representative claim 34. See 37 C.F.R. §41.37(c)(1)(vii).

APPELLANTS' CONTENTIONS

1. Appellants contend that Tindal is directed to *configuration* and not *service creation* as recited in the pending claims. Appellants contend that Patterson fails to cure this deficiency. (App. Br. 4-5).

2. Appellants assert that an artisan would understand that "service creation and configuration are directed to different aspects of providing network services. Service creation is the process of generating new functionality to provide a network service. Configuration, on the other hand, relates to changing the parameters for existing functionality." (App. Br. 4, last paragraph through the first paragraph of page 5).

ISSUE

Based upon our review of the administrative record, we have determined that the following issue is dispositive in this appeal:

Have Appellants shown the Examiner erred in finding that the cited references teach or would have suggested a "service creation tool" as claimed? (*See* claim 34).

PRINCIPLES OF LAW

CLAIM CONSTRUCTION

"[T]he PTO gives claims their 'broadest reasonable interpretation.'" *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)).

OBVIOUSNESS

The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, and (3) the level of skill in the art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966).

"What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 419 (2007). To be nonobvious, an improvement must be "more than the predictable use of prior art elements according to their established functions." *Id.* at 417.

> Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent . . . unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention.

Dunbar v. Myers, 94 U.S. 187, 197 (1876) (citing *Hotchkiss* v. *Greenwood*, 52 U.S. 248, 267 (1850)) (*Hotchkiss* v. *Greenwood* was cited with approval by the Supreme Court in *KSR*, 550 U.S. at 406, 415, 427).

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006). Therefore, we look to Appellants' Brief to show error in the proffered prima facie case.

FINDINGS OF FACT

In our analysis *infra*, we rely on the following findings of fact (FF):

THE TINDAL REFERENCE

1. Tindal discloses a network manager unit that allows the administrator to holistically view, configure and manage an entire network without regard to device type and/or manufacturer. (Abst., ll. 6-8).

THE PATTERSON REFERENCE

2. Patterson discloses "a firewall configuration dialog that may be used to *create* or modify one or more parameter values pertaining to a firewall." (Para. [0248], emphasis added).

ANALYSIS

We decide the question of whether Appellants have shown the Examiner erred in finding that the cited combination of Tindal and Patterson teaches or would have suggested a "service creation tool" as claimed. (Representative claim 34).

As noted above, Appellants contend that "[s]ervice creation is the process of generating new functionality to provide a network service." (App. Br. 4-5). Appellants further contend this limitation is not taught by Tindal, and Patterson fails to cure this deficiency. (App. Br. 4-5).

While Appellants' arguments focus on the function of "service creation" as that term would have been known to those of ordinary skill in the art (*Id.*), we note that claim 34 actually recites a *service creation tool* that performs a specific claimed function.[1] (*See* claim 34).

Therefore, we begin our analysis by construing the claimed "service creation tool" in accordance with the express language of claim 34, as *any tool* that performs the function of programming a service definition package that defines a plurality of packet processing behaviors.[2]

We conclude that the claimed functional language ("defining a plurality of packet processing behaviors") broadly encompasses any packet-based network configuration. Therefore, we conclude that the scope of the claimed "service creation tool" broadly but reasonably encompasses any tool that performs network configuration, such as the network configuration performed by the "network manager unit" of Tindal. (FF 1).

Regarding the secondary Patterson reference, Appellants merely assert that "Patterson is devoid of any discussion of a service creation or a service definition package. Therefore, it fails to supply the teachings that are missing from Tindal." (App. Br. 5).

We find Appellants have failed to rebut the Examiner's findings regarding Patterson with any meaningful analysis. (*See* Ans. 5 and 7-8). Instead of argument, Appellants merely present a conclusory assertion in the

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[1] The *claims* measure the invention. *See SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc).

[2] *See* Claim 34: "a service creation tool operable to program a service definition package, said service definition package defining a plurality of packet processing behaviors;"

Brief. (*Id.*) This form of argument, however, is wholly ineffective in demonstrating error in the Examiner's prima facie case to establish the patentability of the claims on appeal. *See Ex parte Belinne*, No. 2009-004693, slip op. at 7-8 (BPAI Aug. 10, 2009) (informative), *available at* http://www.uspto.gov/web/offices/dcom/bpai/its/fd09004693.pdf

Moreover, by Appellants' own proffered definition of "service creation"[3] we find that Patterson teaches a "tool" (firewall configuration dialog) that programs "a service definition package" (by creating or modifying parameter values) "defining a plurality of packet processing behaviors" (i.e., packet processing by a firewall). (*See* Claim 34 and FF 2).

Lastly, we note that Appellants have not rebutted the Examiner's responsive arguments in the Answer by availing themselves of the opportunity to file a Reply Brief. "Silence implies assent." *Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 572 (1985).

For at least the aforementioned reasons, we do not find Appellants' single attack on the Tindal reference to be persuasive. We find Appellants have not sustained the requisite burden on appeal of providing arguments or evidence persuasive of error in the Examiner's obviousness rejection of representative claim 34 and claims 47, and 60-69 that fall therewith.

[3] "Service creation is the process of generating new functionality to provide a network service." (App. Br. 4-5).

CONCLUSION

Based on the findings of facts and analysis above, Appellants have not shown the Examiner erred in finding that the cited combination of Tindal and Patterson teaches or would have suggested a "service creation tool" as claimed.

DECISION

We affirm the Examiner's decision rejecting claims 34, 47, and 60-69 under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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